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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

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## No. 191

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SAMUEL R. MORGAN,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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LOUIS H. YARRUT,
*Counsel for Petitioner.*

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*To the Honorable the Supreme Court of the United States:*

Petitioner, Samuel R. Morgan, respectfully prays that it may please the Court to review by certiorari the judgment of the Circuit Court of Appeals, Fifth Circuit, affirming his conviction and sentence for alleged violation of a price regulation of the Office of Price Administration (R. 349).

### Basis of Jurisdiction

Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, c. 229, §1, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was rendered May 11, 1945, and rehearing denied on June 7, 1945.

## Questions Presented

I

Can a conviction be rested upon mere unsigned and unauthenticated, typewritten copies of documents, admitted as evidence over objection, where no explanation is offered for non-production of the originals, and there is no opportunity to cross-examine the author of the undisclosed originals?

II

Can a conviction be rested on evidence, adduced over objection, so materially at variance with the charges specified in a bill of information that accused is never apprised before trial of the charges to be met, is deprived of opportunity to prepare defense, and is denied the constitutional right to be informed of the nature and cause of the accusation against him?

## Reasons Relied upon for Allowance of Writ

Affirmance by the Circuit Court of Appeals of petitioner's conviction is so far a departure from the accepted and usual course of judicial proceeding and so far sanctions such a departure by the district court in a matter involving the liberty of petitioner and the proper administration of justice as to call for an exercise of this Court's power of supervision to preserve the integrity of criminal proceedings, and the security of constitutional guarantees.

## Argument

I

The prosecution produced a witness who presented two wholly typewritten, unsigned, instruments, purporting to be copies of a ceiling price list filed by the Pure Ice Com-

pany with the Calcasieu Parish War Price and Rationing Board and which the witness testified she found in the Board's files. The prosecution offered, by such instruments, to prove the ceiling prices alleged to have been violated by petitioner. These unauthenticated copies were admitted as evidence over petitioner's objections (R. 57-66), and the Court of Appeals accepted them as full proof of the ceiling prices alleged to have been violated.

Without proof of the established ceiling price there could be no proof of violation.

The witness who produced the unauthenticated copies intended to establish the ceiling price, declared "all of the documents were taken out of the file and they were gone over rather hurriedly from a technical standpoint as to whether they were signed or unsigned and whether they were considered adequate or inadequate" (R. 60).

The witness had no recollection of the filing of the originals of the documents, for the reason that they were received in a separate office from the one in which she was working (R. 62).

These copies were not records made for the systematic conduct of a business as such, so as to fall within the statute of June 20, 1936 (28 U. S. C. A. 695), and they would not have been admissible as evidence even in a civil case. Compare *Palmer* v. *Hoffman*, 318 U. S. 109, 63 S. Ct. 477.

No effort was made to produce the original documents and no explanation was offered as to their absence.

Absence of primary evidence must be satisfactorily accounted for before secondary evidence may be received. *Hartzell* v. *U. S.*, 72 F. 2d 569, certiorari denied 293 U. S. 621, 55 S. Ct. 216; *Hass* v. *U. S.*, 93 F. 2d 427.

Petitioner had no opportunity to cross-examine anyone as to the verity of the contents of the original documents, as the copies did not disclose by whom the original was pur-

ported to have been made. Thus he was deprived of his constitutional right of confrontation with witnesses.

(The exhibits referred to were sent to the Court of Appeals in their original form, as filed in evidence. Petitioner will move that the Clerk of the Court of Appeals be directed to transmit them to the Clerk of this Honorable Court in the same form, to be incorporated as part of this record.)

II

The bill of information on which petitioner was prosecuted charges him jointly with others with having sold ice at Lake Charles, Louisiana, for a price in excess of the maximum price as fixed by regulation of the Office of Price Administration (R. 2-43).

There was no notice to petitioner that he was to be tried on any but that specific misdemeanor. There was no intimation in the bill of information that it was being used as a vehicle to put petitioner on trial for a conspiracy. Petitioner could not surmise, in preparing his defense, that he would have to meet evidence establishing a conspiracy, as he could not be tried on such a charge without the presentment of a grand jury.

On the trial the prosecution abandoned the specific charges and proceeded, over petitioner's objection, to establish overt acts in support of a conspiracy. The Court of Appeals found no objection to this mode of procedure, though it admitted that "the evidence in the trial would have been competent to prove conspiracy" (R. 353).

In refusing a new trial the district judge showed that he was fully aware of the scheme of the prosecution to charge specific offenses by information so as to avoid the necessity for grand jury action, but he deemed such permissible. Said he:

> "It is true that the indictment simply charges the sales. It charges all of these parties with the particu-

lar offense of making the sales above the ceiling price. It does not charge a conspiracy. Undoubtedly, if a conspiracy had been charged, then all of these matters could have been presented under a conspiracy charge, and wherever the people were, if they were parties and the jury convinced beyond a reasonable doubt that they were participants in the conspiracy, whether they ever put their foot in the state or not, they could have been convicted of the conspiracy. But the government does not do that. I take it that the main reason was that in order to have a conspiracy count, which is a felony, it would have been necessary to have a grand jury called and an indictment returned, and in view of the various situations from the standpoint of effect upon the community, they chose to file a bill of information under the Act creating the Office of Price Administration and the regulations passed pursuant thereto so that this matter might be speedily disposed of'' (R. 328).

Fundamental rules of justice require that an offense be charged with precision and certainty, and that even in the case of misdemeanors the information be free from ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged. *Ledbetter* v. *U. S.*, 170 U. S. 606, 18 S. Ct. 774.

The proof adduced on the trial departed so deliberately and substantially from the charge as made in the bill of information that petitioner was completely and effectively misled in his attempt to defend himself, and such material variance violated petitioner's constitutional right to be informed of the nature and cause of the accusation against him. *Guilbeau* v. *U. S.*, 288 F. 733 (C. C. A. La.).

## Conclusion

WHEREFORE, for the foregoing reasons, petitioner, Samuel R. Morgan, respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals

for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Circuit Court of Appeals may be reversed.

Respectfully,

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